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In the Supreme Court of the United States

October Term, 1988

The Jimmy Swaggart Ministries,

Appellant,

v.

Board Of Equalization of California,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF AMICUS CURIAE OF THE ASSOCIATION FOR PUBLIC JUSTICE IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

I. Are the Religion Clauses in conflict with one another?

II. Does the Free Exercise Clause, interpreted through the lens of the history of the struggle for religious freedom in this country, require a constitutional immunity for churches from sales and use tax imposed on the proclamation of a religious message and on the distribution of religious literature?

III. Is the Establishment Clause violated when the government passively refrains from collecting revenue from the churches in recognition of their constitutional immunityfrom sales and use tax imposed on the proclamation of a religious message and on the distribution of religious literature?

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STATEMENT OF INTEREST

The Association for Public Justice (APJ) is a nationwide nonprofit citizens' organization. Founded in 1973, APJ is headquartered in Washington, D.C. The purpose of APJ is to address issues of structural justice in many areas of public life, including issues of religious expression. APJ believes that as a matter of historic principle the two Religion Clauses of the First Amendment complement one another in a manner that makes possible the nondiscriminatory treatment of all religious groups, as well as the protection of the public's well-ordered concord.

SUMMARY OF ARGUMENT

Members of this Court have, on various occasions, expressed the laudable desire to harmonize the values protected by the two provisions of the religion clause. Taken together, the free exercise and nonestablishment principles protect the freedom of voluntary religious choice and the integrity of religious bodies to manage their own affairs. An accommodation of religion, whether achieved legislatively for legitimate purposes or, as here, required as an implication of the free exercise principle, does not offend the nonestablishment principle. In the view of the amicus, the mutually reinforcing provisions of the First Amendment religion clauses act as a "double guarantee of religious liberty," and should not be regarded as being in hostile tension with one another.

The leading decisions that control this case are *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Follett v. McCormick*, 321 U.S. 573 (1944). It would be an incorrect reading of these precedents to confine them to their precise facts and to conclude that the state has general authority to lay a tax on the direct communication of a religious message by a preacher to willing listeners. To do so is to miss the point of the intense struggle over licensing of the clergy that led to the enactment of the First Amendment. The point to be gleaned from that historical struggle is not simply that a particular form of taxation on the occupation of preachers was rejected, but that the church[1] must be free from the burden of taxation

on the core protected activity of preaching to willing hearers and distributing religious literature to willing readers. The state may not, moreover, convert this protected activity into a taxable commercial enterprise merely because religious adherents contribute money to the church's ministry.

The freedom of churches to announce their message to willing hearers is affirmatively mandated by the free exercise principle of the First Amendment Religion Clause. To impose sales and use tax on religious bodies for the transmission of a spiritual message would gravely inhibit religion. The government may not prevail against this claim merely by invoking the magic word, "taxation," because the governmental interest in the raising of general revenue is not sufficiently compelling to override the damage done to religious freedom by the imposition of this form of taxation. The state has readily available alternatives for revenue production far less burdensome to religious freedom than the transformation of the church into an agent of the state to collect and remit a complicated tax imposed on core protected activity.

Only if the two Religion Clauses are viewed as virtually nullifying one another may the state's recognition of limits to its taxing authority over the church be viewed as a violation of the Establishment Clause. The path of exemption - leaving the churches alone - is clearly the path necessary to avoid the danger of excessive entanglement. To impose a duty on churches to collect *sales tax* for the distribution of religious literature and sacred music gives the state power to define, regulate and supervise the life of the church in an essential ministry. To impose on churches the far more onerous duty of collecting and remitting *use tax* for each piece of religious literature they send to an out-of-state believer runs the risk of still further entanglement. Since it is not only permissible but mandatory to avoid excessive governmental entanglement with religion, prohibiting the kind of taxation at is-

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1 In this brief the term "church" embraces all religious bodies protected under the First Amendment.

sue here has a valid secular purpose and effect. The immunity of the church from this form of taxation thus avoids excessively entangling relationships between church and state, and serves the end of religious freedom.

ARGUMENT

I. The mutually reinforcing provisions of the First Amendment religion clauses act as a "double guarantee of religious liberty."

This case clearly serves as a vehicle for addressing *both* provisions of the Religion Clause. In *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989) the Court invalidated a sales tax exemption that appeared to confer a benefit based on the content of speech, favoring a certain kind of religious viewpoint. Justice Blackmun noted that the Court had left open the question whether "the Free Exercise Clause suggests that a State may not tax the sale of religious literature by a religious organization." *Id.* at 906. That question is squarely presented here.

A plurality of three Justices ruled that the statute violated the Establishment Clause and that the exemption was not required by the Free Exercise Clause. A dissent expressing the views of three Justices urged that an exemption for religious purposes does not violate the Establishment Clause.

Justice Blackmun noted an apparent conflict or tension between these provisions: "The Free Exercise Clause suggests that a special exemption for religious books is required. The Establishment Clause suggests that a special exemption for religious books is forbidden." *Id.* at 906 (Blackmun, J., concurring). In the view of Justice Blackmun, neither the plurality nor the dissent had resolved the relationship between the two provisions satisfactorily. The plurality opinion, in his view, "would resolve the tension between Free Exercise and Establishment Clause values simply by subordinating the Free Exercise value." *Id.* The dissent, in his view, "would subordinate the Establishment Clause value." *Id.* Amicus strongly shares

Justice Blackmun's desire that cases be decided "without sacrificing either the Free Exercise value or the Establishment Clause value." *Id.*

It is not always an easy task to harmonize the values protected by the two provisions of the Religion Clause. Much of the difficulty of this task, however, stems from imagining that the two clauses exist in a state of tension with one another, or even as polar opposites in a grand tug-of-war. According to this view, the Establishment Clause forbids government support of religion or at least a preference of one religious group over another, and the Free Exercise Clause mandates special consideration for religiously motivated dissent from otherwise applicable law. The one is thought to make the state aloof from the churches and the other to make the state deferential to them.

Once the First Amendment is thought of in this way, then the chief task of interpreting it is to devise a means of keeping one clause from swallowing the other. Members of this Court[2] and commentators[3] have noted that this approach has led to confusing and inconsistent results.

The view that the Religion Clauses are at war with one another is not supported by the text of the First Amendment itself, which contains only one main clause ("Congress shall make no law ....") and only one mention of the word "religion." The Framers no more intended to write a contradiction in terms into the Religion Clause (one provision "anti-religion," the other "pro-religion")

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2 See, e.g., *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980).

3 See, e.g., M. Tushnet, *The Constitution of Religion*, in *Red, White, and Blue: A Critical Analysis of Constitutional Law* 247-256 (1988); Paulsen, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 63 Notre Dame L. Rev. 311 (1986); Johnson, *Concepts and Compromise in First Amendment Religion Doctrine*, 72 Calif. L. Rev. 817, 839 (1984); and Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 Univ. of Pittsburgh L. Rev. 673, 680-681 (1980).

than they intended in the Free Press Clause to guarantee both the widespread dissemination of a variety of political opinions and the suppression, by means of prior restraint of criminal sanctions for seditious libel, of views unpopular with the current administration.

A more sensible view of the text and history of the Religion Clause is that both provisions safeguard religious liberty by limiting the power of government over religious groups and over the freedom to be associated (or not to be associated) with these groups.[4] The two clauses should be read as parallel and complementary. In effect, the one protected from a national tithe and the other, from a national dogma. Taken together, both clauses serve to foster freedom of religious choice without governmental involvement in religious matters.

In *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 644 (1970), the Court acknowledged that the two Religion Clauses "would tend to crash with one another" if either or both of the provisions were "expanded to a logical extreme." *Id.* at 668-689. But in the same breath the Court recognized the need for "room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference" *Id.* at 669.

On June 25th, 1988, the bicentennial of the call for a Bill of Rights, prominent national leaders of diverse political and religious perspectives signed a document in Williamsburg, Virginia, to celebrate and reaffirm the meaning of the Religion Clauses.[5] Known as the Williamsburg Charter, this document is fully aware of the danger of combining the functions of church and state:

"In a constitutional order in which the roles of the

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4 See, e.g., Esbeck, *Toward a General Theory of Church-State Relations and the First Amendment*, 4 Pub. L. Forum 325, 337-338 (1985).

5 Because the Williamsburg Charter offers an opportunity to undertake fresh analysis of the Religion Clauses, amicus cites relevant portions of this document at length in this brief. A copy of the document has been served on the parties and has been deposited with the Librarian of the Court.

> government and religion are so intertwined as to be virtually indistinguishable, the temptation is that either the church or the state may succumb to coercion in their claims over minds and souls. When these institutions and their claims have been combined, it has too often resulted in terrible violations of human liberty and dignity. They are so combined when the sword and purse of the State are in the hands of the Church, or when the State usurps the mantle of the Church so as to coerce the conscience and compel belief."

The Williamsburg Charter: A National Celebration and Reaffirmation of the First Amendment Religious Liberty Clauses, at 10 (1988).

Recognizing this historical danger, *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-9 (1947), the framers of the First Amendment strove to prevent the misordering of religion and government, and the confusion of religion and state authority, by placing at the head of the civil liberties protected in the First Amendment a clause prohibiting an establishment and protecting free exercise of religion. Both provisions are thus designed to secure religious freedom by limiting governmental authority that would unduly diminish that precious freedom.

The Religion Clauses, then, should not be thought of as at odds with one another, one for freedom of religion and the other for disestablishment. The nonestablishment principle exists to safeguard the free exercise principle. Both together secure the civil liberty of religious freedom. In the words of the Williamsburg Charter, the two Religion Clauses are "mutually reinforcing provisions [that] act as a double guarantee of religious liberty." *Id.* at 7. To quote the Charter again:

> "[T]he two clauses are essentially one provision for preserving religious liberty. Both parts, No establishment and Free exercise, are to be comprehensively understood as being in the service of religious liberty as a positive good. At the heart of the Establishment clause is the prohibition of state sponsorship of religion and at the

> heart of Free Exercise clause is the prohibition of state interference with religious liberty.
>
> No sponsorship means that the state must leave to the free citizenry the public expression of ultimate beliefs, religious or otherwise, providing only that no expression is excluded from, and none governmentally favored, in the continuing democratic discourse.
>
> No interference means the assurance of voluntary religious expression free from governmental intervention.... No sponsorship and no interference together mean fair opportunity. That is to say, all faiths are free to enter vigorously into public life and to exercise such influence as their followers and ideas engender. Such democratic exercise of influence is in the best tradition of American voluntarism and is not an unwarranted 'imposition' or 'establishment.'"

The Williamsburg Charter, at 16-17.

II. The Free Exercise Clause confers an immunity from sales and use tax on the church's proclamation of a religious message and on distribution of religious literature.

Amicus suggests that this approach to the relationship between the Religion Clauses can lead to a satisfactory result not only in this case, but in Religion Clause jurisprudence generally. Appellant is a church that uses a wide variety of means of communicating its religious beliefs to the general public, including radio and television broadcasting of religious messages, and occasional evangelistic rallies or "crusades." The court of appeal recognized that under *Murdock* and *Follett*, appellant is "entitled to 'as high a claim to constitutional protection as the more orthodox types' of spreading one's beliefs." J.S. App. A10-A11, citing *Murdock*, 319 U.S. at 110. The lower court, however, distinguished these precedents, confining their application to the particular form of tax at issue there, "a flat license tax which was unrelated to

receipts, income or administrative costs of a regulatory scheme." *Id.* at A11.

This constrained reading of *Murdock* and *Follett* is misguided for two reasons. It ignores the way in which the tax imposed here is functionally identical to the flat license tax repudiated in *Murdock* and *Follett*. And it overlooks the real point of the struggle for religious freedom that resulted in the rejection of the obnoxious historical practice of licensing the clergy: in our constitutional order the government is severely constrained in its authority to regulate or control the free exercise of religious ministry.

A. Imposing sales and use tax on the religious ministry of preaching and the distribution of religious literature is the functional equivalent of a flat license tax.

The ordinances involved in *Murdock* and *Follett* prohibited the practicing of various specified occupations without a license. They imposed a flat tax, one unrelated to the volume of business transacted. Although these ordinances were not written with the Jehovah's Witnesses in mind, they were applied "with an evil eye and an uneven hand," *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), in a manner that clearly burdened the pamphleteering of that group. Once a religious minority using unorthodox means of communicating its message is regarded as a "menace" or a "nuisance," its foes will predictably use any weapon at their disposal to deal with the stranger.

The court of appeal was impressed with the difference between the occupational taxes invalidated in *Murdock* and *Follett*, and the sales tax at issue here. For several reasons, however, the similarities are greater than the differences.

First, the court below explained its decision to distinguish *Murdock* and *Follett* by noting that the sales and use tax is broad and facially nondiscriminatory. But, in fact, that is a similarity, not a difference, between this case and *Murdock*, where the occupational taxes were also argued to be acceptable precisely because of their

"wide, nondiscriminatory coverage." D. Manwaring, *Render Unto Caesar: The Flag-Salute Controversy* 196 (1962). Both taxes have only a superficial appearance of even-handedness and neutrality. On closer inspection, both the occupational license tax in *Murdock* and the sales and use tax imposed here are discriminatory in their application. In *Murdock* mainline Protestant, Catholic and Jewish clergy were not asked to pay an occupational license fee; the Witnesses were. Here the Archbishop of Los Angeles was not called in for an audit of all sales in the foyers of Catholic churches; an itinerant evangelist with no local political clout was. Thus the tax burden imposed upon the appellant here was applied with no greater neutrality than were the occupational license requirements in *Murdock* and *Follett*. See *Hernandez v. Commissioner of Internal Revenue*, 57 U.S.L.W. 4593, 4600 (1989) (O'Connor, J. dissenting).

Second, far from being a finely calibrated measure of actual sales, the process of determining the church's use tax liability was based on rough estimates of "what potential sales and donations might have been." J.A. 145, Tr. 153. Both the auditor for the church and the auditor for the state agreed that they could not determine with precision the amounts that were pure donations to the church (clearly exempt from taxation under state and federal law)[6] and the amounts deriving from "sales" of religious literature. Nor could the government get more heavily involved in determinations of this sort without a grave risk of excessive entanglement of the government with religion.[7]

Third, in its impact on the decision to conduct evangelistic crusades in the taxing state, the use tax is the

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6 This Court's recent ruling in *Hernandez v. Commissioner of Internal Revenue*, 57 U.S.L.W. 4593, 4600 (1989), does not rule to the contrary. It merely states that when one receives a precisely measured benefit in exchange for a contribution to a charitable organization, that contribution is not deductible from gross income for tax purposes.

7 See Part III, *infra*. See also Brief Amicus Curiae filed in this case by the Evangelical Council for Financial Accountability.

functional equivalent of the flat tax in *Murdock* and *Follett*. Because the amount of liability is not related to the size or frequency of these crusades, the imposition of use tax is like a flat penalty on clearly protected activity, the distribution of a religious message to willing hearers. As applied to the ministry of the appellant, the tax here is just like the occupational tax invalidated in *Murdock*, only bigger.

Although the Court in *Murdock* focused on the cumulative burden[8] of the particular form of taxation - a flat occupational license fee - on *itinerant evangelists*, that was by no means the sole measure of the harmful impact of the tax. A year later in *Follett*, the Court extended that rule to Witnesses involved in door-to-door evangelism in their own *home town*. The real point of those decisions was not the precise form of the tax at issue, but the impermissible impact of taxation on free exercise of religion.

B. The history of the struggle for religious freedom in this country supports the conclusion that the church is immune from sales and use tax imposed on its distribution of religious literature.

Once it becomes clear that the application of use tax to the distribution of religious literature by an out-of-state evangelist functions like the application of the flat occupational license tax invalidated in *Murdock*, then the reason why both applications are constitutionally impermissible likewise becomes clear. In our constitutional order, the government simply has no business regulating and controlling the clergy. That larger point is clear not only in the text of *Murdock* and *Follett*, but also in the history underlying the Free Exercise Clause.

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8 Once again, the similarity of the burden in *Murdock* and here is more significant than any difference, for the cumulative impact of compliance with use tax regulations for thousands of taxing jurisdictions is formidable. See, e.g., *National Bellas Hess, Inc. v. Dept. of Rev.*, 386 U.S. 753 (1967).

In assessing claims of unconstitutionality under the Religion Clauses of the First Amendment, this Court has urged that special care be given to the lessons of history underlying this provision.[9] For example, in *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970), the Court sustained the practice of exempting the property of religious bodies used exclusively for public worship from the payment of state and local taxes. The appellee and several amici briefed the Court extensively on the history surrounding this practice, and both the opinion of the Court, 397 U.S. at 676, 678, and the concurring opinion of Justice Brennan, 397 U.S. at 680-689, relied extensively on that history. See also *Marsh v. Chambers*, 463 U.S. 783, 788-790 (1983). These cases do not teach that an historical pattern can justify a contemporary violation of a constitutional guarantee, but rather that courts can learn what to scrutinize in contemporary practices by understanding what concerned the framers when they proscribed an establishment of religion and protected its free exercise.

Here, of course, the state cannot point to a long-

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9 In this respect, it is helpful to recall that in the seventeenth and eighteenth centuries an "establishment of religion" was a codeword for deprivation of the civil liberties of virtually all who were not members of the officially sponsored state church. For example, in Elizabethan England Roman Catholics were forced to live five miles beyond the city gates. In the American colonies, the religious outsiders were deprived of the franchise and of eligibility to enter into a profession. Yet they were coerced to provide financial support for the ministers of a church to which they did not belong. See, e.g., T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986); W. McLoughlin, *New England Dissent: 1630-1833: The Baptists and the Separation of Church and State* (2 vols. 1971); C. Antieau, A. Downey, and E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* 1-29 (1964). In short, nonmembers of the establishment were clearly second class citizens. For a helpful exploration of this theme and its implications for contemporary jurisprudence, see *Lynch v. Donnelly*, 465 U.S. 668, 687-694 (1984) (O'Connor, J., concurring).

standing practice of imposing sales and use tax on the church for distribution of religious literature because that form of taxation is of relatively recent vintage, originating as a modest measure to afford relief to the unemployed in the depths of the Great Depression. Nearly[10] as soon as various local governments began to apply the occupational licensing ordinances to burden the free exercise of the Witnesses in the late 1930s and early 1940s, this Court set a constitutional limit to that abuse of the taxing authority in *Murdock* and *Follett*.

Like the *Walz* case, both *Murdock* and *Follett* were informed by the history of the struggle for religious freedom that led to the enactment of the First Amendment. Directly relevant to a correct resolution of this case is the history relating to the licensing of ministers. Ignoring the practical lessons of that history, the court of appeal sustained the imposition of a tax burden that in our culture is the functional equivalent of governmental licensing of the clergy, one of the very practices that the First Amendment was designed to avoid. Because the lower court ignored that history, amicus gives an account of it here.

One of the obnoxious practices indulged in by colonial governments had been the licensing and regulation of dissenting preachers and religious teachers.[11] In New

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10 After sustaining the application of these ordinances to the door-to-door canvassing of the Witnesses in *Jones v. Opelika I*, 316 U.S. 584 (1942), one term later this Court vacated that judgment in *Jones v. Opelika II*, 319 U.S. 103 (1943). See D. Manwaring, *Render Unto Caesar* 195-206 (1962).

11 The framers of the First Amendment were well aware of the threat to civil liberty posed by allowing the government to license the expression of opinion. Licensing had been the chief means of control and suppression of ideas deemed dangerous to the Crown from the statute of Henry VIII in 1530 down to 1697, when the Regulation of Printing Act was allowed to expire. Although the Star Chamber, which had enforced the early legislation, was abolished in 1641, the long Parliament (1640-1660) continued to harass and to censor printers by means of a licensing agency known as the Company of

England, for example, the Congregational establishment helped ironically to foment a spirit of rebellion through its intolerant rules regarding the licensing of ministers. For example, in his famous Memorial to the Massachusetts Assembly in 1775, the prominent Baptist preacher Isaac Backus wrote:

> "Our real grievances are that we, as well as our fathers, have from time to time been taxed on religious accounts where we were not represented.... Is not all America now appealing to Heaven against the injustice of being taxed where we are not represented, and against being judged by men who are interested in getting away our money? And will heaven approve of your doing the same thing to your fellow servants? No, surely. We have no desire of representing this government as the worst of any who have imposed religious taxes; we fully believe the contrary. Yet, as we are persuaded that an entire freedom from being taxed by civil rulers to religious worship is not a mere favor from any man or men in the world but a right and property granted us from God, who commands us to *stand fast in it,* we have not only the same reason to refuse an acknowledgment of such a taxing power here, as America has the abovesaid power, but also, according to our present light, we should wrong our consciences in allowing that power to men, which we believe belongs only to God."

Memorial of the Warren Association, 2 *The Annals of America* 366 (1968). See also W. McLoughlin, *New England Dissent, supra* at 441-476.

In New York, the Church of England enjoyed a notably preferred position, and dissenting Baptists and

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Stationers, which had power to forbid the printing of any book, pamphlet, or paper which it deemed offensive. Although colonial newspapers were not generally required to be licensed, some of the earliest ones followed English precedent by submitting to censorship. The Free Press Clause was aimed at ending this practice of prior restraint. See, e.g., *Lovell v. Griffin*, 303 U.S. 444, 451 (1938).

Presbyterians frequently chafed under the rule which required them to be licensed by the colonial government. An example of abrasive confrontation between church and state is found in the 1707 trial of Francis Makemie, a Scottish Presbyterian denied a license to preach in that colony. At his trial Makemie asserted that the colonial governor's attempt to regulate his freedom to preach and teach was "no law" to him. Defended by three Anglican lawyers, Makemie was acquitted on the charge of preaching without a license, and Trinitarian clergymen except for Roman Catholics were thereafter tolerated "so long as they went about their business peaceably." See, e.g., M. Kammen, *Colonial New York: A History* 157-158 (1975).

A similar preference for the Church of England, with similar problems for dissenting Protestants, obtained in the Southern colonies, including Virginia. See, e.g., H. Eckenrode, *Separation of Church and State in Virginia* (1910). In 1763, Patrick Henry gained prominence as a young lawyer by his spirited defense of three unlicensed Baptist preachers charged with the crime of disturbing the peace by, in Henry's phrase, "preaching the gospel of the Saviour to Adam's fallen race." In his *Life of Jefferson*, Parton notes that Henry's performance "was a triumph of the dramatic art. These men were discharged; but not the less in other counties did zealous bigots pursue and persecute the ministers of other denominations than their own. It was not till the Revolutionary War absorbed all minds, that Baptists ceased to be imprisoned." *Id.*, 204.

This history was still fresh in the mind of the founders of the republic. For example, the principal drafter of the First Amendment, James Madison, was impelled to a lifelong concern on behalf of religious freedom because of his experience of seeing unlicensed Baptist preachers locked up in the jail of Culpeper County. See W. Miller, *The First Liberty: Religion and the American Republic* 95-96 (1985). The unmistakable conclusion of this history is that intervention by the secular authority in the dissemination of a religious message was one of the very

specific evils against which the language of religious liberty was crafted, first in the Bills of Rights of the several states and then in the Free Exercise Clause of the First Amendment.

It would, of course, be an artificial and wooden reading of this history to confine its lessons to the precise form of governmental interference with preaching described above. That would be to assume that we are incapable of inventing new forms of inhibiting and burdening religious speech (such as the tax appellee seeks to impose on churches), and that it is not "a constitution that we are interpreting." *McCulloch v. Maryland*, 17 U.S. 316 (1819). Both of those predicates are erroneous. The history surrounding the adoption of the First Amendment stands for a much larger principle. That history clearly repudiates the imposition of sales and use tax collection liability on the churches for their distribution of their religious message to believers.

For these reasons, this Court should reaffirm that a tax imposed on the proclamation of a religious message by a church is impermissible under the Free Exercise Clause of the First Amendment.

III. Acknowledging the immunity of religious bodies from sales and use tax for the distribution of religious literature does not offend the Establishment Clause because it serves the legitimate secular purpose of avoiding excessively entangling contacts between government and religious bodies.

Appellant addresses the Establishment Clause issue at length in the opening brief, Br. for Appellant, at 35-45. To avoid duplicative briefing, amicus merely expresses here its general agreement with the views set forth in the Brief for the Appellant, and discusses this theme briefly to illustrate its view that what is protected under the free exercise principle should not be regarded as violating the nonestablishment principle.

If the two Religion Clauses are viewed as tugging in opposite directions, then the church could not be immune

from sales and use tax, even as applied to the core protected activity of proclaiming the gospel. When the clauses are viewed more harmoniously, however, the artificial tension between them is dissolved.

In the tension-filled interpretation of the Clauses the immunity from taxation described as supported by free exercise principles, Part II, *supra*, would inevitably run afoul of the Establishment Clause. It was just such a view that the Attorney General urged in *Thomas v. Review Bd. of the Indiana Employment Security Division*, 450 U.S. 707 (1981). Br. for Respondent, at 17-19 (any accommodation of religion under the free exercise principle is violative of the nonestablishment principle). This Court expressly rejected that extreme view of the relationship between the two Religion Clauses. 450 U.S. at 719-720.

Central to a correct resolution of this case and to a general theory of the Religion Clauses is the recognition that the nonentanglement principle requires the government to avoid needless or excessive intervention in the life of religious communities. Although this Court has included the nonentanglement principle as one of the criteria for adjudicating cases arising under the Establishment Clause,[12] some commentators have suggested that the protection of the autonomy and integrity of a religious body fits more properly within Free Exercise than within Establishment Clause jurisprudence.[13] Whether viewed as a free exercise problem or one arising under the nonestablishment principle, the direct and inevitable result of the decision below will be an unacceptable level of governmental intervention in the life of the church. For that reason alone, it should be reversed.

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12 See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

13 See, e.g., Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981); Riggs, *Judicial Doublethink and the Establishment Clause: The Fallacy of Establishment by Inhibition*, 18 Val. L. Rev. 285 (1984); Ripple, *The Entanglement Test of the Religion Clauses - A Ten Year Assessment*, 27 U.C.L.A. L. Rev.1195, 1210-1216 (1980).

This Court has repeatedly suggested that the mere potential of excessive entanglement of the government with religion suffices to invalidate a program. See, e.g., *Aguilar v. Felton,* 105 S.Ct. 3237 (1985). As the record in this case discloses, the intrusion of the audit process in the life of a church has already become an actual, not merely a potential threat to religious freedom.

The seriousness of this difficulty can easily be gauged by another example of appellee's unsympathetic behavior towards churches. In *ISKCON v. Bd. of Equalization*, Notice of Redetermination No. SR AS 18-649831, the California Board of Equalization recently assessed against a religious body over $43,000 in past due sales and use tax, interest and penalties, arising exclusively from the church's distribution of its sacred scriptures. When this determination was made, the church informed the Board that it could not pay the full amount of the assessment, and sought to negotiate a payment plan. The Board then conducted a probing post-audit analysis of the religious organization's financial records to ascertain its ability to pay the tax on the "sale" of sacred literature, which the church had challenged on the ground that this purported tax liability violated the rule announced in *Murdock* and *Follett.* The Board's auditor, for example, questioned expenditures allocated by the church's leadership for its annual religious festival, and urged the church officials to reduce that line in the church budget so that the church would be able to pay its contested tax bill sooner. During the process of these difficult negotiations, the Board recorded a tax lien encumbering all of the church's property used exclusively for religious purposes.

As in *Walz, supra,* opting for an immunity for churches from imposition of sales and use tax liability for the distribution of their sacred literature and their sacred music to their own adherents turns out to be the far less entangling alternative than taxing the churches in this way. Where, as here, the purpose and effect of an accommodation of religion is to avoid excessively entangling relationships between the government and religion,

that accommodation easily passes muster under the straightforward criteria developed in *Lemon, supra*. See, e.g., *Corporation of Presiding Bishop v. Amos*, 107 S. Ct. 2862, 2868 (1987), see also at 2871 (Brennan, J. concurring); Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy* 81 Colum. L. Rev. 1373 (1981); and McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1.

In the light of these considerations on excessive entanglement, amicus offers three further comments on *Texas Monthly*. First, as was noted above, a majority of the Court viewed a particular exemption for religious literature as unwarranted because the benefit apparently flowed to religious groups only. That majority, however, includes two Justices who thought that the Free Exercise question presented here was still open.

Second, amicus suggests that the plurality is mistaken in assuming that there is "little danger of stomping out missionary work," *id.* at 904, if churches throughout the nation are put to the burden of this form of taxation on religious ministry. Everything that amicus knows about the mission of the churches in their outreach efforts supports the conclusion that this tax burden will severely chill protected religious activity.

Third, the plurality suggested that the sales tax burden falls on the buyer, and therefore creates no burden for the churches. 109 S.Ct. at 904. This view is mistaken as a matter of state law in many jurisdictions, where the primary obligation of the tax falls on the seller.[14] More importantly, this view overlooks the fact that even in those jurisdictions where the so-called primary obligation of the incidence of the tax falls on the buyer, the actual burden of the seller to calculate, collect and remit use tax is considerable.[15]

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14 See Table 3, Br. for Appelant, A-16 - A-22.

15 To support its contention that use tax collection liability would be excessively burdensome and entangling, appellant made the following offer of proof at trial: "The accounting involvement to collect, report,

The tax immunity proposed here corresponds closely to one of the principal historical reasons for the adoption of the Religion Clause, the movement to abolish the licensing of the clergy, and is therefore suggested by the Free Exercise Clause. Because that immunity avoids rather than entails governmental entanglement with religion, it passes muster under the Establishment Clause. This form of tax immunity - narrowly tailored to protected religious activity - does not constitute an establishment of religion. It is the best means of avoiding one.

Letting religion be free is not the same as establishing a religion. After all, religious freedom is not a gift from the government, but is - James Madison's term - a fundamental and inalienable right. As the Williamsburg Charter puts it:

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and file sales and use tax returns in all of these taxing jurisdictions throughout the United States would be an insurmountable burden for churches to bear in regard to the expense of distributing their religious message. The accounting and legal involvement required would be: (1) to determine the tax in each different location; (2) to keep track of all of the changes in that tax on at least a monthly basis; (3) to collect the different tax from individuals in each of those locations; (4) to report the different tax; (5) to secure and file returns in each of those locales; (6) to respond to audit inquiries in each of those locales; (7) to devise some method in many jurisdictions of advertising the price and the tax rate so that the individuals solicited for such donations or sales would know the amount of tax to send with their request so that the proper amount could be collected; (8) to develop a procedure to dub a different advertisement onto each tape for each different television station locale, which now exceeds 600 local television stations plus thousands of local cable outlets the dubbed advertisement would have to be flexible enough to state the varying tax rates for the varying locations to which [appellant] would be required to mail religious-content materials within the viewing area of that station or cable outlet); (9) to prepare receipts to each of these individuals to properly account for the proper rate of tax; (10) to establish and maintain an extensive library constantly to provide for each of the thousands of taxing jurisdictions within the United States in state, county, municipal, and other special taxing districts." J.A. 204-209.

> "Religious liberty depends on neither the favors of the state and its officials nor the vagaries of tyrants or majorities. Religious liberty in a democracy is a right that may not be submitted to vote and depends on the outcome of no election. A society is only as just and free as it is respectful of that right, especially toward the beliefs of its smallest minorities and least popular communities."

The Williamsburg Charter, at 9.

CONCLUSION

The conclusion that the decision below should be reversed is fully consistent with the view advanced here that the Religion Clauses should not be thought of as at odds with one another, one for freedom of religion and the other for disestablishment. Both the nonestablishment principle and the free exercise principle secure the civil liberty of religious freedom. Both principles require the decision below to be reversed. For these reasons, the judgment of the Court of Appeal of California should be reversed.

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 22, 1989, I served the within ***Brief Amicus Curiae of The Association for Public Justice in Support of Appellant*** in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
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Washington, D.C. 20543
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I declare under penalty of perjury that the foregoing is true and correct. Executed on June 22, 1989, at Los Angeles, California.

Betty J. Malloy
(Original signed)